No. 89-993

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1989

GARY BRYANT,
Petitioner,

vs.

FORD MOTOR COMPANY
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES

The parties to this action are Gary Bryant, an individual, and Ford Motor Company ("Ford"), a corporation, the parties listed in the caption. Ford's corporate subsidiaries and affiliates have been previously listed in Exhibit F to the Petition.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Ford Motor Company ("Ford") opposes the petition of Gary Bryant for a writ of certiorari. As set forth below, the requirements for the issuance of a writ of certiorari are not satisfied.

COUNTERSTATEMENT OF THE CASE

Certain matters have been omitted or not fully identified in Petitioner's statement of the case, and this counterstatement will explicate them.

1. The UPS van Bryant was driving when he was involved in an accident was 15 years old. Nevertheless, Bryant sued Ford for negligent manufacture, breach of warranty, and strict liability. Ford was the only named defendant, and the only defendant against whom any allegations of fact were made. The gravamen of the Complaint was that the vehicle was defective in some unspecified manner. Discovery later disclosed that Bryant's real complaint concerned the seat belt and restraint system. Ford did not manufacture them; it manufactured only the chassis.

2. While Bryant did allege in his Complaint that each of the 50 Doe defendants was "legally responsible, negligently or in some other actionable manner" for events referred to in the Complaint and that all defendants were the "agents, servants, employees and/or joint venturers of their co-defendants," such conclusory allegations were the only allegations against the Does, and even they were made on information and belief. The Complaint contained no averment of fact against any such Doe — no description of any Doe, no statement of when any such Doe had done anything, no assertion of what any such Doe had done.

3. When Ford timely petitioned for removal, Bryant interposed no objection, and made no motion to remand, even though Ford's verified petition asserted that allegations against the Doe defendants were sham. Instead, discovery proceeded in federal court, Ford made a motion for summary judgment, and Bryant filed responding papers. Still Bryant made no motion to remand. Bryant did not file an appropriate affidavit under Fed.R.Civ.P. 56(f) indicating a need for further discovery, nor petition the district court to delay consideration of Ford's motion.

Nor did Bryant move to amend his Complaint to assert any claim against any party other than Ford.

4. Not until after judgment had been rendered in favor of Ford did Bryant make a motion to add new parties. The district court, ruling under Fed.R.Civ.P. 60(b), found no excusable neglect for the delay in making such a motion, and declined to set aside the judgment.

5. At least as of the time that Bryant took his appeal, he had other actions pending against other parties growing out of this same accident. Bryant told the Ninth Circuit that he had filed actions in both the United States District Court, Eastern District of Pennsylvania, and the Court of Common Pleas of Philadelphia County concerning the accident in question. Appellant's Brief on Appeal at 9 n.4 (filed on or about June 1, 1985). Although Bryant asserts in his Petition that the 50 Does were "real," Petition at 3, he has never identified anywhere near 50 "real" Does, and logic suggests there could not have been 50 people responsible for Bryant's single-vehicle accident.

6. The Judicial Improvements and Access to Justice Act, P.L. 100-702, 102 Stat. 4642 (1988) ("the Act") not only resolved the question of how district courts should treat Doe defendants for purposes of removal, but did so in a way that indicated thorough familiarity with the previous Ninth Circuit decision in this case, and the pleading practices in California. The House Report noted:

> Subsection (a) amends 28 U.S.C. 1441(a) to permit the citizenship of fictitious defendants to be disregarded. This amendment addresses a problem that arises in a number of states that permit suits against "doe" defendants. The primary purpose of naming fictitious defendants is to suspend the running of the statute of limitations. The general rule

> has been that a joinder of Doe defendants defeats diversity jurisdiction unless their citizenship can be established, or unless they are nominal parties whose citizenship can be disregarded even if known. This rule in turn creates special difficulties in defining the time for removal. Removal becomes possible when the Doe defendants are identified or dropped, perhaps as late as the start of trial, or when it becomes clear that any claims against the Doe defendants are fictitious or merely nominal. At best, the result may be disruptive removal after a case has progressed through several stages in the State court. At worse, [sic] the result may be great uncertainty as to the time when removal becomes possible, premature attempts to remove and litigation over removability, and forfeiture of the removal opportunity by delay after the point that in retrospect seems to have made clear the right to remove. These problems can be avoided by the disregard of fictitious defendants for purposes of removal. Experience in the district courts in California, where Doe defendants are routinely added to state court complaints, suggests that in many cases no effort will be made to substitute real defendants for the Doe defendants, or the newly identified defendants will not destroy diversity. If the plaintiff seeks to substitute a diversity-destroying defendant after removal, the court can act as appropriate under proposed § 1447(d) to deny joinder, or to permit joinder and remand to the State court.
>
> H.R. REP. No. 100-89, 100th Cong., 2d Sess. 71 (1988) *reprinted in* [1988] U.S. CODE CONG. & AD. NEWS 5982, 6031-32.

Congress' description of the law concerning Doe defendants closely matched that of the Ninth Circuit in

Bryant v. Ford Motor Co., 844 F.2d 602 (9th Cir. 1988) ("Bryant II"). This Court had granted certiorari to review *Bryant II* before the Act became law.

With these matters in mind, it is clear that the Petition should be denied.

REASONS FOR DENYING THE PETITION

I.

PETITIONER LACKS STANDING TO CHALLENGE 28 U.S.C. § 1447(e)

Petitioner lacks standing to assert his primary argument. Petitioner asserts that section 1016 of the Act, a portion of which is now codified in 28 U.S.C. § 1447(e), is unconstitutional. Section 1447(e) authorizes a federal court either to deny a post-removal motion to add parties or to grant the motion and remand to State court. Neither the Ninth Circuit nor the district court applied this provision of the Act to Petitioner. Thus, Petitioner may not attack its constitutionality.

The Ninth Circuit was explicit in holding that its decision was *not* based on section 1447(e):

> Bryant addresses a critical threshold issue in a footnote: his standing to challenge section 1447(e). Obviously, the district court did not enter judgment against Bryant on the authority of section 1447(e). It was not in existence. Recognizing this formidable obstacle, Bryant argues that this court can only affirm the district court's entry of summary judgment upon a "determination that the district Court's refusal to permit BRYANT to amend his complaint and join the additional defendants was appropriate

> under the new (and retroactively applied) 28 U.S.C. 1447(e)."
>
> Bryant's premise is faulty. As we explain in our analysis of the merits of his appeal, *infra,* the district court did not deny a motion to amend the complaint to add new defendants — Bryant never filed such a motion and only sought to add new defendants after the entry of judgment. As Bryant is incorrect that we can affirm the district court's rulings only by reference to the new section 1447(e), he lacks standing to challenge this amendment. [Citation omitted].

Bryant v. Ford Motor Co., 886 F.2d 1526, 1531 (9th Cir. 1989) ("Bryant III").

Thus, while Petitioner theorizes about conflicts between section 1447(e) and state rules relating to statutes of limitations, no such conflicts exist here. Moreover, they may never exist. In a proper case, a district court in a removal action might allow joinder but remand the case. But a proper case is not one, like this one, where Petitioner made no motion to add parties until after judgment. In this respect, too, Petitioner's assertion that in California state court a case against the Does "survives resolution of the case against the named parties," Petition at 10, also is incorrect. Neither of the cases Petitioner cites, *Barrows v. American Motors Corp.,* 144 Cal.App.3d 1, 192 Cal.Rptr. 380 (1983) and *Streicher v. Tommy's Electric Co.,* 164 Cal.App.3d 876, 211 Cal.Rptr. 22 (1985) stands for the proposition that under California law parties can be added *after judgment.*

The Court should not address the Constitutionality of a statute unless the record clearly reflects that the Petitioner is a proper party to invoke judicial resolution of the dispute. *FW/PBS, Inc. v. City of Dallas,* 58 U.S.L.W. 4079

(U.S. January 9, 1990). This petitioner is not the proper party to challenge the Act's provisions on adding parties post-removal, because the statute was not applied to him.

II.

THE PETITION SHOULD BE DENIED BECAUSE THE COURT OF APPEALS APPLIED SETTLED LAW, AND PETITIONER'S ASSERTIONS CONCERNING RETROACTIVE APPLICATION CAN HAVE ONLY LIMITED IMPACT

The Court of Appeals stated that this was a case of "nearly unprecedented procedural posture." *Bryant III,* 886 F.2d at 1529. Reviewing this case would have an impact limited to the parties to this action, and no one else. For Petitioner to succeed on the merits, he must demonstrate that the Act does not apply to him and that the now-vacated decision of the Court of Appeals, which this Court previously had decided to review, was correct. In short, he must seek not only to invalidate the present Act, but also to affirm a decision under prior law, law which currently applies to no one. This Court has stated clearly that it does not review matters that are merely "academic or episodic." *Rice v. Sioux City Cemetery,* 349 U.S. 70, 74 (1955).

Petitioner concedes that Congress has the authority to legislate the jurisdictional base of the removal statute. Petition at 8. The decision of the Court of Appeals to apply the jurisdictional base to this case clearly followed the instructions of this Court. In *Bradley v. School Board of City of Richmond,* 416 U.S. 696, 711 (1974), this Court stated that when legislative changes occur while a case is pending on direct review a court "shall apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory

direction or legislative history to the contrary." This Court itself has applied that directive to legislative changes in jurisdictional statutes. *Andrus v. Charlestone Stone Products Co., Inc.,* 436 U.S. 603, 607 n.6 (1978).

Petitioner does not even cite *Bradley* or attempt to assert that the Court of Appeals erred in following it. Rather he asserts that he was deprived of property without due process because the Court of Appeals vacated its decision following the denial of certiorari. However, petitioner cites no authority for the proposition that a court of appeals violates due process if it exercises its discretion to vacate its opinion, before its mandate has issued, because of intervening legislation. The court of appeals below likened the situation to that of recalling its mandate, recognized that it did so only in extraordinary circumstances, and found such circumstances present here. *Bryant III,* 886 F.2d at 1529-30. The one other circuit which has addressed the issue reached the same conclusion. *Alphin v. Henson,* 552 F.2d 1033 (4th Cir.), *cert. denied,* 434 U.S. 823 (1977).

Nor is Petitioner correct that the effect of the court's decision to apply the present statute is "devastating" to him. Petition at 15. Petitioner still had causes of action against other defendants pending in at least two other courts. Petitioner might even had had causes of action available in California state court under the doctrine of equitable tolling of the statutes of limitation. *Cf. Valenzuela v. Kraft, Inc.,* 801 F.2d 1170 (9th Cir. 1987). What Petitioner did not have was a claim against Ford, because judgment in Ford's favor was properly affirmed.

The Court of Appeals applied settled law under *Bradley,* and reached the proper decision. Review of that decision would not affect other parties, making this case an inappropriate one for *certiorari.*

CONCLUSION

The Petition should be denied.

Dated: January 22, 1990.

Respectfully submitted,

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